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Nos. 96-568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JOSEPH ONCALE,

Petitioner,

v.

SUNDOWNER OFFSHORE SERVICES, INC.; JOHN LYONS; DANNY PIPPEN; AND BRANDON JOHNSON,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For the Fifth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENTS

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association of

approximately 50,000 attorneys who primarily represent plaintiffs in personal injury, civil rights and commercial law cases. Letters of consent of the parties have been filed with the Court.[1]

ATLA believes that the refusal of the United States Court of Appeals for the Fifth Circuit to recognize any claim for same-sex sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e through § 2010 (1995), jeopardizes the national policy of nondiscrimination in employment and erodes the right of employees to be free from sexual and gender harassment in the workplace.

SUMMARY OF ARGUMENT

In enacting Title VII of the Civil Rights Act of 1964, Congress established a "national policy of nondiscrimination in employment" and "mandated equal access to employment and its concomitant benefits for female and male workers." H.R. Rep. No. 948, 95th Cong., 2d Sess. 3 (1978)(amending Title VII). Title VII "tolerates no. . . discrimination, subtle or otherwise." *McDonnell Douglass Corp. v. Green*, 411 U.S. 792, at 801.

[1] Pursuant to Rule 37.6, Amicus Curiae discloses that no counsel for a party authored any part of this Brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make any monetary contribution to the preparation or submission of this Brief.

The decision in *Oncale v. Sundowner Offshore Services, Inc.*, 83 F.3d 118 (5th Cir. 1996), offends Title VII's broad mandate and frustrates the national policy of nondiscrimination in employment. The decision departs from clearly established principles for inferring unlawful discrimination in favor of an arbitrary, illogical and unprecedented blanket ban on same-sex sexual harassment claims. The standard applied in *Oncale* affords unlawful discriminators an unwarranted reprieve from federal discrimination laws based merely on the discriminator's sex and without regard to the discriminator's actual discriminatory intent or the effect of the unlawful conduct. Amicus asks this Court to reject the holding in *Oncale*, reverse the Fifth Circuit and find that same-sex sexual harassment suits are actionable under Title VII.

ARGUMENT

The Fifth Circuit's decision in *Oncale* followed a line of precedent out of that circuit. In an unpublished decision, that court held that

> [h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination.

Giddens v. Shell Oil Co., No. 92-8533 (5th Cir. Dec. 6, 1993).

In *Garcia v. Elf Atochem North America*, 28 F.3d 446 (5th Cir. 1994), the court followed *Giddens* and held that the harassing supervisor's conduct "could not in any event constitute sexual harassment within the purview of

Title VII." Id., at 452. The Fifth Circuit's decision in *Garcia* was the first published federal appellate court decision to consider whether same-sex sexual harassment was actionable under Title VII. The Fifth Circuit also is the only court of appeal to rule that same-sex sexual harassment is not actionable in any context.

In *Oncale*, the Fifth Circuit again relied on the reasoning of *Giddens*, citing *Garcia* as binding precedent. Again, without differentiating between *quid pro quo* and hostile environment sexual harassment, the Fifth Circuit held that Title VII does not authorize same-sex sexual harassment claims.

I. Title VII Unambiguously Prohibits Discrimination Against Enumerated Categories of Employees Without Regard to the Category of the Alleged Harasser.

Title VII creates a "broad rule of workplace equality." *Harris v. Forklift Sys., Inc.*, 510, 522 U.S. 17 (1993). Subsection (a) of Title VII provides:

> It shall be an unlawful employment practice for an employer--(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Id. § 2000e-2(a)(1).

Title VII does not distinguish between men and women, either as harassers or as plaintiffs. *See Doe v. Belleville*, --F.3d--, 1997 WL 400219, *4 (7th Cir. 1997);

Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 752 (4th Cir.), *cert. denied*, -- U.S. --, 117 S.Ct. 70 (1996). Neither the language nor the legislative history of Title VII indicates that an individual's right to pursue an action for sex discrimination is conditioned upon the sex of the harasser or the harassee. Title VII provides simply that it is unlawful to "discriminate against any individual. . . because of such individual's. . . sex. . . ." 42 U.S.C. § 2000e-2(a)(1)(1995).

In enacting Title VII, Congress did not provide only that it is illegal to discriminate against an individual of *another* race, or that it is illegal to discriminate against a member of the *opposite* sex. The language chosen unambiguously provides that anyone discriminated against because of sex may bring suit regardless of the particular protected category of the alleged discriminator.

Moreover, neither Title VII nor established precedent suggests that this Court should depart from Title VII's plain language in the context of a claim for sexual harassment. Although it was widely accepted that Title VII barred discrimination in economic aspects of employment, it was not until 1986 in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, that this Court held that an employer also discriminates within the meaning of Title VII when the employer fails to provide a work environment free from discriminatory intimidation, ridicule and insult.

According to the *Meritor* Court, "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women'' in employment,"

including requiring employees to work in a discriminatorily hostile or abusive environment. *Id.*, at 64.

In order to reach this conclusion, this Court drew upon principles developed in the racial harassment context. Specifically, this Court quoted with approval the Eleventh Circuit's decision in *Henson v. Dundee*, 682 F.2d 897, 902 (1982).

> "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."

Meritor, at 59 (quoting *Henson*).

That right "to work in an environment free from discriminatory intimidation, ridicule, and insult" extends to all of the enumerated categories of Title VII--race, color, religion, sex and national origin. *See, e.g., Meritor*, at 66 (citing *Rogers v. EEOC*, 454 F.2d 344 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972); *Firefighters Institute for Racial Equality v. St. Louis*, 549 F.2d 506, 514-15 (8th Cir.), *cert. denied sub nom., Banta v. United States*, 434 U.S. 819 (1977); *Compston v. Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976)(harassment and abuse of Jewish employee); *Cariddi v. Kansas City Chiefs Football Club*, 568 F.2d 87, 88 (8th Cir. 1977)(national origin)).

That right "to work in an environment free from discriminatory intimidation, ridicule, and insult" also extends to men as well as women. Both Congress and this Court have made it very clear that Title VII's prohibitions on sex discrimination apply to both genders. *Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 682 (1983); 110 Cong. Rec. 2578(1964)(Title VII was intended to "cover white men and white women and all Americans.")(remarks of Rep. Celler)(cited in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976); *Barnes v. Costle*, 561 F.2d 983, 994 (D.C. Cir. 1977)("The legislative history similarly discloses a congressional purpose to outlaw any and all sex-based discrimination equally with any other form of discrimination which Title VII condemns.")(citations omitted). In fact, Title VII prohibits discrimination against members of any statutorily protected group, "'minority or majority.'" *McDonald, at* 279.

All evidence suggests that Congress did not specifically consider the possibility of a claim for same-sex sexual harassment when it enacted Title VII. It is widely known that "sex" was added to the enumerated categories in Title VII in order to make Title VII so unattractive to legislators that the proposed bill would not be enacted. *Meritor Savings*, 477 U.S. at 63-64.

Nevertheless, it is apparent from Title VII that Congress was intent on eliminating arbitrary and discriminatory barriers to employment. The mere fact that Congress did not address the instant issue and had an expressed desire to gut discriminatory employment practices does not "create 'a negative inference' limiting

the scope of [Title VII] to the specific problem that motivated its enactment." *Newport News*, at 679.

II. Neither the Gender, Nor the Sexual Orientation of the Alleged Harasser Is Sufficiently Probative to Bar An Inference of Sex Discrimination.

The Fifth Circuit's decisions in *Oncale*, *Garcia*, and *Giddens* apparently stem from its acceptance of a flawed premise that only opposite-sex or non-class members are able to create sexually hostile work environments. This premise is an unreasonably narrow, illogical and unprecedented interpretation of the scope of Title VII's protections.

This Court recently cautioned lower courts that it is improper to require a plaintiff to allege and prove facts which may be irrelevant to the ultimate issue of whether the plaintiff was the victim of discrimination. In *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S.--, 116 S.Ct. 1307 (1996), this Court reminded federal courts that the imposition of arbitrary categorical burdens upon aggrieved employees without regard to the fundamental question of discrimination can only serve to deny individuals rights guaranteed by federal discrimination statutes.

In *O'Connor*, this Court made it exceedingly clear that in any claim under Title VII there must be a logical connection between the *prima facie* burden imposed upon a plaintiff and the prohibited discriminatory criteria. *Id.*, at 1310. *See also Doe*, at *19 ("it is ill-advised to make categorical assumptions about which factual scenarios

bespeak discrimination and which do not."). The right of any individual to pursue a claim for sexual harassment must always be premised on the simple question of whether the individual is able to offer evidence to support an inference of unlawful discrimination.

Nevertheless, the Fifth Circuit's decision in *Oncale* imposes an arbitrary categorical ban upon certain sets of plaintiffs claiming sexual discrimination. According to the Fifth Circuit, if a plaintiff has the misfortune of being harassed by a member of the same sex, then the plaintiff could not have been sexually harassed under Title VII.

The Fifth Circuit is alone in holding that Title VII bars all same-sex sexual harassment suits. The First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and D.C. Circuits have held, stated in dicta or have assumed without comment that Title VII permits same-sex sexual harassment claims. *See Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 192-93 (1st Cir. 1990); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 148 (2d Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1047 (3d Cir. 1977); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 141-43 (4th Cir. 1996); *Yeary v. Goodwill Indus. Knoxvill, Inc.*, 107 F.3d 443, 447-48 (6th Cir. 1997); *McDonnell v. Cisneros*, 84 F.3d 256, 260 (7th Cir. 1996); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428 (7th Cir. 1995); *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376-77, 1379 (8th Cir. 1996); *Steiner v. Showboat Oper. Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995); *Purrington v. University of Utah*, 996 F.2d 1025, 1028-31 (10th Cir. 1993); *Fredette v. BVP Management Assoc.*, 112 F.3d 1503 (11th Cir. 1997); and

Bundy v. Jackson, 641 F.2d 934, 942 (D.C. Cir. 1981). Guidelines adopted by the Equal Employment Opportunity Commission ["E.E.O.C."] similarly interpret Title VII to permit suits for same-sex sexual harassment. II EEOC Comp. Man., CCH, § 615.2(b)(3) (Oct. 1981). As the Seventh Circuit recently concluded, "it is evident that *anyone* sexually harassed can pursue a claim under Title VII, no matter what her gender or that of her harasser." *Doe*, at *8 (emphasis added).

Similarly, the Fifth Circuit can find no company for its position in other Title VII contexts either. Generally, principles developed in other discrimination contexts are applicable to sex discrimination claims brought under Title VII. *See Meritor*, at 59 (drawing upon racial harassment principles).

It is settled that an employee's claim for race, national origin or religious discrimination is not barred by the mere fact that the alleged discriminator is a member of the same protected class. *Cf. Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 609-10 (1987). Where "[t]he statute on its face treats each of the enumerated categories exactly the same," *Price Waterhouse v. Hopkins*, 490 U.S. 228, at 244 n.9 (1989), it is "untenable to allow reverse discrimination cases but not same-sex sexual harassment cases to proceed under Title VII." *E.E.O.C. v. Walden Book Co., Inc.*, 885 F. Supp. 1100, 1103 (M.D. Tenn. 1995).

A number of courts, however, have imposed what appears to be a rebuttable presumption in same-sex sexual harassment suits. Namely, some courts presume that an employee cannot state a claim for same-sex sexual

harassment absent an allegation and offer of proof that the alleged harasser is a homosexual. *See, e.g., Wrightson*, at 141-42; *McWilliams*, at 1195 & n.5; *Fredette*, at 1504-05; *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, at 752 (4th Cir.), *cert. denied*, -- U.S. --, 117 S.Ct. 70 (1996); *McDonnell v. Cisneros*, 84 F.3d at 260; *Ward v. Ridley School Dist.*, 940 F. Supp. 810, 813 (E.D. Pa. 1996).

Still, those same courts do not permit an employer to defeat an opposite-sex sexual harassment claim by similarly rebutting the charge with proof that the alleged harasser is gay. *See Doe*, at *24. No court has ever linked the right of an aggrieved individual to recover for opposite-sex harassment to a demonstration that the harasser is heterosexual or even more particularly that the alleged harasser's conduct is driven by sexual desire.

Requiring allegation and proof of homosexuality confuses sexual attraction with sexual harassment and ignores the wide-scope of behaviors that are otherwise actionable as sexual harassment. *See Doe*, at *19; Deering, Christopher W., Comment, *Same-Gender Sexual Harassment: A Need to Re-examine the Legal Underpinnings of Title VII's Ban on Discrimination Because of Sex*, 27 Cumb. L.Rev. 231 (1997). As the Seventh Circuit noted in *Doe*, "[t]he focus on the sexual orientation of the harasser betrays a fundamental misconception that sexual harassment inevitably is a matter of sexual desire run amok--in other words, that the harasser is attracted to the victim and simply cannot restrain himself." *Id.*, at *22. *See also Blozis v. Mike Raisor Ford, Inc.*, 896 F. Supp. 805 (N.D. Ind. 1995).

ATLA agrees that same-sex sexual harassment in which the harasser is motivated to some extent by sexual desire is logically indistinguishable from opposite-sex sexual harassment by a heterosexual male or female similarly motivated by sexual desire. ATLA also believes, however, that same-sex sexual harassment in which the harasser is motivated by sex discrimination other than sexual desire is logically indistinguishable from opposite-sex sexual harassment in which the harasser is similarly motivated.

Sexual harassment, like other types of discrimination under Title VII, comes in many forms. Sexual harassment certainly is not limited to those occasions when the harasser is driven by sexual desire. "Men sexually harass women in the workplace for reasons other than sexual desire; but that does not detract either from the sexual content of the harassment or from the uniquely intrusive and denigrating impact sexual harassment has upon the women who experience it." *Doe*, at *25; *See also* Shahan, Amy, Comment, *Determining Whether Title VII Provides Cause of Action for Same-Sex Sexual Harassment*, 48 Baylor L.Rev. 507 (1996). "[T]he relevant legal question" is whether the conduct at issue "is sufficiently patterned or pervasive, [to] comprise an illegal condition of employment under Title VII." *McKinney v. Dole*, 765 F.2d 1129, at 1139 (D.C. Cir. 1985); *See also Quick v. Donaldson Co.*, 90 F.3d 1372, 1379 (8th Cir. 1996); Thorpe, Joshua F., *Gender-Based Harassment and the Hostile Work Environment*, 1990 Duke L. J. 1361 (1990); H. Kay, *Sex-Based Discrimination* 535 (1988); 29C.F.R. § 1604.11(a).

Those courts that require allegation and proof of homosexuality ignore the discovery nightmares and ultimate shortcomings that necessarily attach to proving "homosexuality." After the Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), courts of appeal have unanimously noted that individuals who engage in homosexual conduct are entitled to no special constitutional protection as either a suspect class or a quasi-suspect class "because the *conduct* which places them in that class is not constitutionally protected." *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati*, 54 F.3d 261 (6th Cir. 1995)(emphasis added).

Nevertheless, if conduct is what makes an individual homosexual, at what point does conduct equate to class membership? How would a plaintiff prove that the harasser is homosexual? Would the plaintiff have to offer an admission that the supervisor desired to engage in homosexual sex with members of the same sex? If so, given the already substantial stigma that attaches to that admission, the requirement will gut Title VII rights for sexual harassment victims harassed by same-sex supervisors.

Absent an admission, what quantum of proof of homosexual conduct is sufficient to demonstrate homosexual class membership? If a supervisor engaged in homosexual behavior at one point in his life, does that make him a homosexual for purposes of a sexual harassment claim under Title VII at some other point?

What if the supervisor and co-workers held the plaintiff down, exposed themselves to the plaintiff and threatened the plaintiff with anal sex? Is that

"homosexual" conduct and does that conduct make the individuals members of the group of homosexuals?

More importantly, the sexual orientation of an alleged harasser cannot logically be determinative of a plaintiff's ability to bring a claim under Title VII. Rather than impose outright categorical bans on particular discriminatory scenarios, federal courts should adhere to the tests previously announced by this Court and the E.E.O.C. to determine whether or not an employer has created a sexually hostile environment. Those tests invariably focus on the nature, severity and impact of the challenged conduct and not on the sex of the perpetrator. *See Meritor*, at 64-65; 29 C.F.R. § 1604.11(a)("[V]erbal or physical conduct of a sexual nature constitute[s] sexual harassment when. . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.").

While a demonstration that the harasser was homosexual might help to support an inference of discrimination, the imposition of that affirmative burden is inconsistent with this Court's mandate in *O'Connor* and a plaintiff's right to work free of sexual harassment. "[T]he viability of a discrimination claim [must not] turn on arbitrary factors that do not capture the universe of actionable discrimination." *Doe*, at *21; *See also Quick*, at 1376-77, 1379.

III. The Fifth Circuit's Decision In *Oncale* Immunizes Employers Who Permit Homosexual Harassment of Employees From Liability Under Title VII.

The decision in *Oncale* necessarily ensures that individual same-sex sexual harassers and their employers are immunized from liability without regard to the conduct, its consequences, or the harasser's and the employer's discriminatory intent. Again, this outcome offends Title VII's broad policy of nondiscrimination and Title VII's obvious language. There is no basis in the statute for affording freedom from liability to employers who fail to ensure that the workplace is free of same-sex sexual harassment.

As discussed above, neither the language of Title VII nor its legislative history supports a conclusion that homosexuals who sexually harass were intended not to be covered by Title VII. The language and legislative history also do not support a conclusion that employees were expected to endure sexual harassment at the hands of homosexuals in the workplace.

Every federal court of appeal (except the Fifth Circuit) has held, assumed without deciding, or stated in dicta that a same-sex sexual harassment claim based on homosexual advances from a superior is actionable under Title VII. *See, e.g., Yeary*, 107 F.3d 443; *Fredette*, 112 F.3d 1503. Same-sex harassment motivated by sexual desire is logically indistinguishable from opposite-sex sexual harassment by a heterosexual male or female similarly motivated by sexual desire. *See, e.g., Doe*, at *24-25. As this Court stated in *Meritor*, "when a

supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex." *Id.*, at 64.

CONCLUSION

Amicus asks this Court to reverse the Fifth Circuit's order in *Oncale*. The Fifth Circuit's decision ignores the unambiguous language of Title VII and imposes an arbitrary and absolute barrier to discrimination claims under Title VII when the harasser is the same sex as the employee. There is no basis in Title VII, or this Court's interpretations of Title VII, to support the Fifth Circuit's categorical refusal to recognize same-sex sexual harassment claims.

Respectfully submitted,

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